No. 2103

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM BLACKWELL,

Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Rules of U.S. Circuit Court
of appeals
755

No. 2103

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM BLACKWELL,

Plaintiff in Error,

vs.

THE SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Attorneys.

Messrs. THOMAS, BEEDY & LANAGAN, Attorneys for Plaintiff in Error,

Alaska Commercial Building, San Francisco, California.

C. W. DURBROW, Esq., Attorney for Defendant in Error,

Flood Building, San Francisco, California.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. 2103.

WILLIAM BLACKWELL,

Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant in Error.

Stipulation (Under Rule 23).

WHEREAS, the above-named plaintiff in error has filed with the clerk of the above-named court the record of the above-entitled action, and has docketed said cause with said clerk; and

WHEREAS, said plaintiff in error has duly filed his assignment of errors, and hereby specifies and designates the following as the errors upon which he intends to rely on the hearing of said cause, namely:

That the facts found are insufficient to support the judgment in the said action in the following particulars:

I.

The Court found that the actual loss of the assignor of plaintiff and of the plaintiff was $5,694.76, and the judgment was for $1,760.70 only.

II.

The Court found that the actual value of the goods shipped was $5,694.76, and that such goods were delivered to the consignee thereof in bad order and condition, due to the negligence of the defendant, and that on account of such bad order and condition, the actual loss was the actual value; yet the judgment was for $1,760.70 only.

III.

The Court found that at the time of the delivery to the defendant, or its connecting carrier, of the whiskey and spirits described in the complaint, an Internal Revenue Tax of $1.10 per gallon, imposed by public statute had been paid thereon; yet the judgment was for $1,760.70 only, that is to say, 50 cents per gallon.

IV.

The Court found that the consignor of the goods and the initial common carrier thereof agreed, at the time of the various shipments set forth in the complaint, that the whiskey and spirits shipped were of a "value limited to 50 cents per gallon," but found that the agent of the initial carrier knew, at the time of such shipments, that the value was greater than 50 cents per gallon; yet, in spite of the illegality of such agreement, the judgment was for $1,760.70 only, in lieu of the real value of $5,694.76.

V.

The Court found that the various published tariffs issued by the defendant and other connecting common carriers by rail covering the shipments involved in the above-entitled action, compelled the consignors of the whiskey and spirits shipped to limit the risk of such carriers to 50 cents per gallon or pay an additional freight rate of 20%; yet, in spite of the illegality of such published tariffs, the judgment was for $1,760.70 only, when in fact the actual loss was $5,694.76, as found.

VI.

The Court found that the assignor of the plaintiff delivered annually to the defendant its written agreement, by which it released the defendant and its connecting carriers in advance from any liability for goods lost or damaged above the valuations arbitrarily fixed in their published tariffs; yet, in spite of the illegality of such agreement, the judgment was for $1,760.70 only, in lieu of the real value of $5,694.76.

NOW, THEREFORE, it is hereby stipulated and agreed by and between the parties that the following parts of the record and no other shall be printed by the clerk, namely:

First. Complaint and Exhibit "A" attached thereto, appearing in said record at Page 1.

Second. The answer appearing in said record at page 9.

Third. Stipulation waiving jury, appearing in said record at Page 14.

Fourth. Findings of fact and conclusions of law,

appearing in said record at Page 22.

Fifth. Judgment, appearing in said record at Page 30.

Sixth. Certificate to judgment-roll, appearing in said record at page 32.

Seventh. Petition for writ of error, appearing in said record at Page 45.

Eighth. Assignment of errors, appearing in said record at Page 46.

Ninth. Order allowing writ of error, appearing in said record at Page 49.

Tenth. Bond on writ of error, appearing in said record at Page 50.

Eleventh. Clerk's certificate to record on writ of error, appearing in said record at Page 52.

Twelfth. Writ of error, appearing in said record at Page 53.

Thirteenth. Citation on writ of error, appearing in said record at Page 54.

Fourteenth. This stipulation.

IT IS FURTHER STIPULATED that the title of the court and cause in full on said papers shall be omitted, except on the first page, and that there may be inserted in place and stead thereof the words, "title of court and cause."

Dated this 9th day of January, A. D. 1912.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiff in Error.

G. B. SHOUP and
C. W. DURBROW,
Attorneys for Defendant in Error.

[Endorsed]: No. 2103. Circuit Court of Appeals of the United States, Ninth Circuit, Northern District of California. William Blackwell, Plaintiff in Error, vs. Southern Pacific Company, Defendant in Error. Stipulation (Under Rule 23). Filed Jan. 11, 1912. F. D. Monckton, Clerk.

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

WILLIAM BLACKWELL,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That he was at all the times hereinafter mentioned and still is a citizen of the State of California.

II.

That at all the times hereinafter mentioned the Crown Distilleries Company was, and still is, a corporation duly organized and existing under the laws of the State of California and a citizen of that State; and that at all the times hereinafter mentioned the said defendant was, and still is, a corporation duly organized and existing under the laws of the State of Kentucky, and a citizen of that State.

III.

That at all the times hereinafter mentioned the

said defendant was, and still is, a common carrier of goods by rail, with western termini in San Francisco, Sacramento, and Oakland, in the State of California, and with several eastern termini at points in the United States east of said City and County of San Francisco.

IV.

That at various dates during the three years last past [1*] and prior to the filing of the complaint in this action the defendant received in the course of its business, as such common carrier, at one of its eastern termini, certain goods, to wit, whiskey and spirits, a particular description of which, and the dates of shipment thereof, being fully set forth in Exhibit "A" attached hereto and made a part of this complaint.

V.

That upon the receipt of such goods the said defendant, as such common carrier, agreed for a valuable consideration to transport the same over its railroad lines and deliver the same in good order and condition to the said Crown Distilleries Company, at San Francisco, Oakland and Sacramento, as specified in said Exhibit "A"; that the said goods were not delivered to the said Crown Distilleries Company in good order and condition, but in bad order and condition, which said bad order and condition was due to the negligence and neglect of duty of the defendant, its servants, agents and employees.

VI.

That by reason of such negligence and neglect of

*Page-number appearing at foot of page of original certified Record.

duty and by reason of the fact that the said goods were not delivered in good order and condition, as agreed, the said Crown Distilleries Company suffered loss and was damaged on each shipment in the amounts specified in detail in said Exhibit "A," and that the total loss and damage of the said Crown Distilleries Company was and is Five Thousand Six Hundred Ninety-four and 76/100 (5,694.76) Dollars.

VII.

That the said Crown Distilleries Company has demanded of defendant the repayment to it of the amount of said damage and loss, but that the defendant has refused and still refuses to pay the same. [2]

VIII.

That prior to the commencement of this action the said Crown Distilleries Company duly assigned its claims against the defendant, as set forth in said Exhibit "A," and that the said plaintiff is now the owner and holder of said claims.

WHEREFORE, the plaintiff prays for judgment against the defendant in the sum of Five Thousand Six Hundred Ninety-four and 76/100 (5,694.76) Dollars, interest and costs.

THOMAS, GERSTLE, FRICK & BEEDY,
Attorneys for Plaintiff. [3]

Exhibit "A" [to Complaint].

80 Bbls. Whiskey shipped on or about Sept. 10/05 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 Bbl. with Stave broken and leakage resulting therefrom.

Loss of contents 15.71 Gals. Value.. $40.85

60 Bbls. Spirits shipped on or about Jan. 4/07 from Peoria, Ill., to Oakland, Cal., in carload shipment delivered with 3 Bbls. Staves broken and balance leaking.

Loss of contents 104.68 Gals. Value.. 135.03

70 Bbls. Spirits shipped on or about March 8/07 from Peoria, Ill., to Sacramento, Cal., in carload shipment resulting delivered with cooperage damaged and leakage therefrom.

Loss of contents 56.38 Gals. Value.. 75.45

60 Bbls. Spirits shipped on or about Sept. 18/06 from Peoria, Ill., to Oakland, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom—on or about Nov. 13/06.

Loss of Contents 117.86 Gals. Value. 157.56

60 Bbls. Spirits shipped on or about May 29/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 169 Gals. Value... 230.04

60 Bbls. Spirits shipped on or about March

22/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 131.65 Gals. Value. 169.80

60 Bbls. Spirits shipped on or about March 1/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 26.55 Gals. Value.. 34.25

60 Bbls. Spirits shipped on or about April 18/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with 1 Bbl. plugged and part of contents pilfered and part of balance leaking.

Loss of contents 49.20 Gals. Value.. 64.95

100 Bbls. Whiskey shipped on or about April 30/07 from Lynchburg, Ohio, to San Francisco, Cal, in carload shipment delivered with 1 Bbl. plugged and part of contents pilfered and 1 Bbl. leaking.

Loss of contents 16.79 Gals. Value.. 43.65

60 Bbls. Spirits shipped on or about April 4/07 from Peoria, Ill., to Oakland, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 75.89 Gals. Value.. 97.90

100 Bbls. Whiskey shipped on or about May 6/07 from Philadelphia, Pa., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 43.85 Gals. Value.. 113.10

77 Bbls. Whiskey shipped on or about Apr. 18/07 from Alton, Ky., to San Francisco, Cal., in carload shipment delivered with 1 Bbl. plugged and part contents pilfered part balance cooperage damaged and leakage therefrom.

Loss of contents 31.80 Gals. Value.. 81.09

60 Bbls. Spirits shipped on or about May 7/07 from Peoria, Ill., to San Francisco, Cal., on carload shipment delivered with 1 Bbl. plugged and contents pilfered part balance cooperage damaged and leakage therefrom.

Loss of Contents 89.16 Gals. Value.. 120.35

60 Bbls. Spirits shipped on or about April 27/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 152.62 Gals. Value.. 206.10

100 Bbls. Whiskey shipped on or about April 30/07 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage therefrom.

Loss of contents 43.65 Gals. Value.. 104.76

100 Bbls. Whiskey shipped on or about May 20/07 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 Bbl. plugged cooperage damaged and leakage resulting therefrom.

Loss of contents 38.74 Gals. Value.. 110.40

60 Bbls. Spirits shipped on or about May 2/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged plugged and leakage or pilferage resulting therefrom.

Loss of contents 158.58 Gals. Value.. 218.58

60 Bbls. Spirits shipped on or about July 16/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with 2 Bbls. Short (pilfered in transit) and part of balance with cooperage damaged and leakage resulting therefrom.

Loss of contents 236.02 Gals. Value.. 311.55

60 Bbls. Spirits shipped in or about June 15/07 from Peoria, Ill., to Oakland, Cal., in carload shipment, delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 174.32 Gals. Value.. 228.78

60 Bbls. Spirits shipped on or about June 7/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leak-

age resulting therefrom.

Loss of contents 94.29 gallons. Value. 123.52

[5]

60 Bbls. Spirits shipped on or about June 29/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage plugged and damaged, with leakage or pilferage resulting therefrom.

Loss of contents 174.37 gallons. Value 228.42

60 Barrels spirits shipped on or about Aug. 22/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 60.93 gallons. Value. 82.80

60 Barrels Spirits shipped on or about June 4/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage broken and damaged, and leakage resulting therefrom.

Loss of contents 224.32 gallons. Value 296.60

40 Barrels and 20 half-barrels Whiskey shipped on or about Dec. 20/07 from Cinci*nat*ti to San Francisco, Cal., in carload shipment delivered with one-half-barrel short, pilfered in transit.

Loss of contents 30.80 gallons. Value. 98.56

60 Barrels spirits shipped on or about Nov. 1/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with 3 barrels empty, contents pilfered;

balance cooperage damaged and leakage resulting therefrom.

Loss of contents 317.34 gallons. Value 428.40

100 Barrels Whiskey shipped on or about Nov. 21/07 from Alton, Kentucky, to San Francisco, Cal., in carload shipment delivered with one barrel short, pilfered in transit, 2 barrels heads gone, contents pilfered, part of balance load cooperage plugged and damaged, contents lost through pilferage and leakage.

Loss of contents 166.21 gallons. Value 565.10

100 Barrels Whiskey shipped on or about April 22/08 from Lawrenceburg, Ind., to San Francisco, Cal., in carload shipment delivered with 1 Barrel-head broken out, empty; 1 barrel plugged, part contents gone, pilfered, part balance of load cooperage damages with leakage resulting therefrom.

Loss of contents 90.17 gallons. Value 261.50

60 Barrels Spirits shipped on or about Nov. 30/07 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 107.03 gallons. Value 144.50

100 Barrels Whiskey shipped on or about May 22/08 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 barrel short, and 7 bbls. broken and nearly empty. Bal-

ance cooperage damaged and leakage resulting therefrom.

Loss of contents 146.21 gallons. Value 180.62

[6]

60 Barrels Spirits shipped on or about Feb. 14/08 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 200.25 gallons. Value 270.35

100 Barrels Whiskey shipped on or about Dec. 11/07 from Lynchburg, Ohio, to San Francisco, Cal., in carload shipment delivered with 1 barrel broached and empty; 1 barrel plugged, part contents gone, pilfered.

Loss of contents 68.92 gallons. Value. 213.65

71 Barrels Whiskey shipped on or about July 2/08 from Henderson, Ky., to San Francisco, Cal., in carload shipment delivered cooperage damaged and leakage resulting therefrom.

Loss of contents 49.42 gallons. Value. 108.70

60 Barrels Spirits shipped on or about Aug. 18/08 from Peoria, Ill., to San Francisco, Cal., in carload shipment delivered with cooperage damaged and leakage resulting therefrom.

Loss of contents 41.28 gallons. Value. 57.80

43 Barrels Whiskey shipped on or about Sept. 26/06 from Baltimore, Md., to San Francisco, Cal., in L/C/L shipment re-

ceived with cooperage damaged and leakage resulting therefrom.

Loss of contents 31.05 gallons. Value. 90.05

[7]

State of California,
City and County of San Francisco,—ss.

William Blackwell, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

WM. BLACKWELL.

Subscribed and sworn to before me this 25th day of November, A. D. 1908.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 27, 1908. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [8]

[Title of Court and Cause.]

Answer.

Defendant, for answer herein:

Upon the ground that it has not sufficient information or belief upon the subject to enable it to answer, denies that it at all received, in the course of its business as a common carrier or otherwise, at any of its termini or any other place, any whisky or spirits

specified in Exhibit "A" referred to in Paragraph IV of plaintiff's complaint, or that it received any such shipments on the dates specified in said exhibit, or otherwise or at all.

Upon the same ground, denies that upon the receipt of said goods by defendant as a common carrier or otherwise, it at all agreed, for a valuable or any consideration, or otherwise, to transport said goods over any of its railroad lines, or to deliver the same in good order or condition to said Crown Distilleries Company at San Francisco, Oakland or Sacramento, as specified in said Exhibit "A," or at any other place or at all; or that said goods were not delivered to said Crown Distilleries Company in good order or condition, or that said goods were in bad order or condition, or that said alleged bad order and condition was at all due to any negligence or neglect of duty of defendant or of its servants, agents or employees. [9]

Defendant denies that by reason of said alleged negligence or neglect of duty, or by reason of the fact that said goods were not delivered in good order and condition as agreed, or by any other reason or at all, said Crown Distilleries Company suffered any loss, or was at all damaged, on any shipment in any amount, as specified in said Exhibit "A," or otherwise or at all, or that the total loss or damage of said Crown Distilleries Company at all was or is $5,694.-76, or any other sum or at all.

Upon the ground that it has not sufficient information or belief upon the subject to enable it to answer, defendant denies that said Crown Distilleries Com-

pany at all assigned any claim against defendant, as set forth in said Exhibit "A" or otherwise, or that said plaintiff is not now the owner or holder thereof.

For a further and separate answer, defendant alleges, on its information and belief, that the shipments specified in Exhibit "A" attached to plaintiff's complaint were received by defendant and its connections, as common carriers, at the points specified in said exhibit, for carriage to the points therein specified, upon and subject to the terms, provisions and conditions of certain written contracts for said carriage, accepted and signed by the consignor of said shipments, wherein and whereby and by the express terms and conditions whereof, and by the express terms, provisions and conditions of the tariffs and classifications in effect at the time of said shipments, and in consideration of the special rates of freight or hire therein mentioned, and of the apportionment of said rates of freight or hire to the value of the property to be carried, it was specially agreed by and between said consignors and defendant and its connections that the value of said shipments should be deemed to be, for all the purposes of said contract, [10] the just and full sum of 50 cents per gallon, and said value was therein and thereby declared to be said sum of 50 cents per gallon.

It was further expressly provided in said tariffs and classifications, and in and by said written contracts and the express terms, provisions and conditions thereof, for the considerations aforesaid, that in case any loss or damage should be sustained, for which said defendant or its connections should be

liable, the amount to be claimed by said consignors or their assigns, for said liquors so lost or damaged should be adjusted on the basis of the value at the time and place of shipment, not exceeding the declared value as in said tariffs and classifications provided and in said written contracts set forth, and on which declared value and rate of transportation therein named said shipments were based; and in no event should defendant or its connecting carriers be liable for any loss of said shipments, or any damage thereto, in excess of said agreed and declared valuation; and that in no event should there be any recovery from defendant or its connections for any loss of or damage to said shipments, from whatever cause arising, in excess of said declared or agreed value.

That at the time of delivering said shipments to defendant and its connections, and of accepting and signing said written contracts, said consignors had knowledge of and accepted said contracts with knowledge of the terms, provisions and conditions thereof and of the tariffs and classifications in force at said times, and defendant and its connections had no knowledge of the true value of said shipments or any or either of them, or of the value of any or either of said shipments other than said declared value, and said rates of freight or hire for [11] the carriage of said shipments from the points specified in said Exhibit "A" to said destinations specified therein were fixed by defendant and its connections with reference to said declared and agreed values, and defendant and its connections thereby determined the said rates of freight or hire for transporting said

shipments between said specified points. And defendant avers that the regular rate of freight or hire for transporting said shipments between said specified points would have been higher if no valuation of said shipments had been declared by or agreed to by said consignors or shippers by said contracts of carriage, or if a higher valuation than 50 cents per gallon had been declared by said shippers or consignors.

WHEREFORE said defendant prays for judgment and for its costs herein incurred.

C. W. DURBROW.
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

E. E. Calvin, being duly sworn, deposes and says: That he is the Vice-president and General Manager of Southern Pacific Company, defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true.

E. E. CALVIN.

Subscribed and sworn to before me this 17th day of December, 1908.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California. [12]

Service of the within Answer is admitted this 17th day of December, 1908.

THOMAS, GERSTLE, FRICK & BEEDY,
Attorneys for Plaintiff.

[Endorsed]: Filed December 18, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

[Title of Court and Cause.]

Stipulation Waiving Jury.

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, that said action may be tried by the Court sitting without a jury, and the said parties hereby waive their right to have said action submitted to and the issues determined by a jury.

THOMAS, GERSTLE, FRICK & BEEDY,
Attorneys for Plaintiff.
C. W. DURBROW,
Attorney for Defendant.

[Endorsed]: Filed March 15, 1909. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [14]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

The above-entitled action came on regularly to be heard before the above-entitled court, a jury having been waived, on November 23d, 1909, Messrs. Thomas, Gerstle, Frick & Beedy, appearing for the plaintiff, and C. W. Durbrow, Esq., appearing for the defendant, and from the evidence introduced at such trial, the Court now finds the following facts:

I.

That prior to the commencement of the action, the Crown Distilleries Company, a California corporation, duly assigned the claim set forth in the complaint, to the plaintiff, who was, at the time of the commencement of such action, and still is, the owner and holder of such claim.

II.

That at all the times described in the complaint, the defendant was a common carrier of goods by rail, with western termini in San Francisco, Sacramento and Oakland, in the State of California, and with several eastern termini, at points in the United States east of said California; and that in the course of its business as a common carrier, such defendant received, on various occasions between September 10th, 1905, and [22] August 18th, 1908, at one of its eastern termini, in good order and condition, certain whiskey and spirits, described in the complaint herein, of the actual value of Five Thousand Six Hundred Ninety-four and 76/100 Dollars ($5,694.76), and that said defendant undertook to deliver said goods in good order and condition to the Crown Distilleries Company, at San Francisco, Oakland or Sacramento.

III.

That such goods were not delivered by the defendant to the Crown Distilleries Company in good order and condition, but that such goods, when delivered, were in bad order and condition.

IV.

That said Crown Distilleries Company, by reason

of the fact that such goods were not delivered in good order and condition, as agreed, suffered an actual loss of Five Thousand Six Hundred Ninety-four and 76/100 Dollars ($5,694.76).

V.

That at the time of the delivery to the defendant, or to some common carrier connecting with its eastern termini, of the whiskey and spirits in question, and prior thereto, there had been imposed upon such whiskey and spirits an internal revenue tax of one and 10/100 dollars ($1.10) per gallon, and that said amount of tax formed a portion of the real value of said whiskey and spirits, in addition to the valuation of fifty (50) cents per gallon specified in the bills of lading issued at the time of the various shipments referred to in said complaint; that said tax had been imposed and was existing by virtue of the Public Statutes of the Government of the United States, regularly enacted, which said Statutes were in full [23] force and effect and were a matter of public record at the dates of all of the shipments described in the complaint, and that such whiskey and spirits were delivered to the defendant, or its connecting carrier, after all such taxes so imposed had been duly and fully paid.

VI.

That during the years of such shipments, the Crown Distilleries Company annually executed and delivered to the defendant an instrument, in the words and figures following:

"SOUTHERN PACIFIC COMPANY–SEASON FREIGHT RELEASE.
SAN FRANCISCO STATION.

THE FOLLOWING APPLIES TO AND COVERS ALL GOODS, WARES, AND MERCHANDISE DELIVERED AT ANY TIME FROM DATE HEREON DURING THE CURRENT YEAR.

WHEREAS, the undersigned ship and receive goods, wares and Merchandise over the lines of the Southern Pacific Company, and from its connecting Transportation Companies at above Station to and from divers parties at divers stations on said lines;

AND WHEREAS, said Company and its connections propose to transport such goods, wares and merchandise at rates which are less than charged for the same classes of freight shipped under the Carrier's legal responsibility, in consideration of the undersigned releasing the Carriers as hereinafter set forth;

AND WHEREAS, the Western classification, in connection with the Tariffs of the Southern Pacific Company, often provides lower rates for shipments conditioned on an agreed valuation;

AND WHEREAS, the undersigned desire to secure the benefit of such special rates, and to avoid the trouble and inconvenience of executing a separate contract for each shipment;

NOW, THEREFORE, in consideration of these premises I or we do hereby release the SOUTHERN PACIFIC COMPANY, and each and every other Transportation Company over whose lines said goods may pass, from any and all liability for dam-

age by leakage, shifting, chafing or breakage on any and all shipments, whenever the Tariff provides a lower rate for transporting at owner's risk; or for breakage of any property packed in boxes, barrels, crates, or bales when such packages have not been roughly handled or for breakage, chafing, wet, rust, or any other injury resulting from the fragile nature of the freight, imperfect or insecure packing, bad or insufficient cooperage, or shipping without packing, or from the decay of perishable articles, or from damages arising from the effects of heat or cold; or damages by stains to packages, by sweating or fermentation, or damages to freight by reason of its own inherent vice, [24] or liability, and from all loss and damage by any cause whatsoever not resulting from the gross negligence of one or another of said Transportation Companies, on all goods, wares and merchandise which may be SHIPPED or RECEIVED by us at released rates on any or either of the lines of the said Southern Pacific Company or connecting companies.

And do further release said SOUTHERN PACIFIC COMPANY and each and every Company over whose line or lines said freight may have been or will be transported to destination, from all liability for loss or injury when lower rate is applied conditioned on a limited valuation while on any or either of the lines of said Company or Companies.

CROWN DISTILLERIES CO.

LOUIS S. HAAS,

Secretary."

D. S. MURRAY, Witness.

VII.

That each of the bills of lading issued by the defendant, or its connecting carrier, upon the receipt of the various shipments described in the complaint, had upon its face, inserted by the carrier, the words: "Valuation 50 cents per gallon; owners' risk leakage"; or the words: "Value limited to 50 cents per gallon; O. R. L."; and that the letters "O. R. L. mean: "Owners' risk of leakage." And that the rates paid by the shipper upon each of said shipments were based upon such limited valuation.

VIII.

That the various public tariffs issued by the defendant, and other common carriers by rail, covering the shipments involved in this action, were in the words and figures following, to wit:

"SPIRITS IN WOOD.	WHISKEY IN WOOD.
Min. C/L Wgt.	Min. C/L Wgt.
24,000 lbs.	24,000 lbs.
"Carriers' risk limited to 50¢ per proof gallon, and so receipted for.....	$ .85 $1.25
Carriers' risk not so limited.....	1.02 1.50

The present westbound tariff has at different times carried various rules relating to released valuation as follows:

(A) Effective January 18, 1904,—Rule 16. Where articles are provided for released to given valuations, the release given by shipper should clearly state the limitation of valuation. When this requirement is omitted, shipments will be subject to an additional charge of 20%. [25]

(B) Effective January 10, 1908—Rule 16 (as

amended): When a rate named in this tariff is fixed by limitation of value, shipper MUST endorse shipping order or bill of lading 'RELEASED TO VALUATION REQUIRED UNDER THIS TARIFF.' When such notation is omitted, a charge of 20% additional to rates named herein will be made. This will not apply when actual value does not exceed the valuation named in this tariff.

(C) Effective February 10, 1908—Rule 16 (as amended): When a rate named in this tariff is fixed by limitation of value, shipper must endorse on shipping order or bill of lading 'RELEASED TO ——— VALUATION AS REQUIRED UNDER THIS TARIFF.' When such notation is omitted, a charge of 20% additional to rates named herein will be made. This will not apply, however, when actual value does not exceed the valuation named in tariff, nor on commodities for which through specific rates are named on different valuations.

(D) Effective March 17, 1908—Rule 16 (as amended): When rate named in this tariff on any article is conditioned upon a limited valuation, as specified in this tariff, shipper must endorse on shipping order or bill of lading in terms set forth in this tariff and sign such indorsement:

'THE AGREED VALUE OF THIS SHIPMENT IS $———.

———————,

Shipper.'

When such notation is omitted, a charge of 20% additional to rates named herein on such articles will be made. This will not apply, however, when

actual value does not exceed the valuation named in tariff.

(E) Effective April 17, 1908—Current—Rule 16 (as amended): When rate named in this tariff on any article is conditioned upon a limited valuation as specified in this tariff, shipper must indorse on shipping order or bill of lading in terms set forth in this tariff and sign such indorsement as follows:

'THE AGREED VALUE OF THIS SHIPMENT IS $———.

———————,

Shipper.'

When such notation is omitted, a charge of twenty per cent (20%) additional to rates named herein on such articles will be made.

The terms set forth in the current West-Bound Tariff with respect to limitation of carriers' liability for shipments of Spirits and Whiskey read as follows:

'Owners risk of evaporation, outage or leakage, carriers' risk to be limited to 50 cents per proof gallon and so receipted for.' (Words 'owners risk of evaporation, outage or leakage' were eliminated from the tariff by Supplement 59 thereto, effective January 10, 1908." **[26]**

IX.

That the bad order and condition in which the whiskey and spirits were delivered to the Crown Distilleries Company was due to the negligence of the defendant.

X.

That the agent of the initial carrier who shipped

the various bills of lading knew, at the time of such issue, that the whiskey and spirits described in such bills of lading were of greater value than fifty (50) cents a gallon.

And as a conclusion of law from the foregoing facts, the Court finds that the plaintiff and his assignor are bound by the valuation of fifty (50) cents per gallon, and that, therefore, the plaintiff is entitled to recover the sum of One Thousand Seven Hundred Sixty and 70/100 Dollars ($1,760.70), and no more.

Let judgment be entered accordingly.

WM. C. VAN FLEET,
Judge.

Dated November 14th, 1911.

[Endorsed]: Filed Nov. 15, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [27]

[Title of Court and Cause.]

Judgment on Findings.

This cause having come on regularly for trial upon the 23d day of November, 1909, before the Court sitting without a jury, a trial by jury having been waived by written stipulation of the attorneys for the respective parties, William Thomas, Esq., appearing as attorney for the plaintiff and C. W. Durbrow, Esq., appearing as attorney for the defendant, and evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys, having been submitted to the Court for consideration and decision, and the

Court, after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law by reason of the findings aforesaid, it is considered by the Court that William Blackwell, plaintiff, do have and recover of and from Southern Pacific Company, defendant, the sum of One Thousand Seven Hundred Sixty and 70/100 ($1,706.70) Dollars, together with his costs herein expended taxed at $———.

Judgment entered December 12, 1911.

SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk.

A True Copy. Attest:
[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Maling,
Deputy Clerk. **[30]**

[Endorsed]: Filed Dec. 12, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[31]**

[Title of Court and Cause.]

Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 12th day of December, 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed December 12, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. **[32]**

[Title of Court and Cause.]

Petition for Writ of Error.

Now comes William Blackwell, the plaintiff herein, and says that on the 12th day of December, 1911, this Court entered judgment herein, in favor of the said plaintiff and against the said defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the Assignment of Errors which is filed with this petition;

WHEREFORE, plaintiff prays that a Writ of Error may issue in this behalf, out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the clerk of said Court of Appeals.

THOMAS, FRICK & BEEDY,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [45]

[Title of Court and Cause.]

Assignment of Errors.

The plaintiff in the above-entitled action, in connection with this petition for a writ of error, assigns the following errors in the decision of the Circuit Court upon which he will rely in the prosecution of such writ of error:

That the facts found are insufficient to support the judgment in the said action in the following particulars:

I.

The Court found that the actual loss of the assignor of plaintiff and of the plaintiff was $5,694.76, and the judgment was for $1,760.70 only.

II.

The Court found that the actual value of the goods shipped was $5,694.76, and that such goods were delivered to the consignee thereof in bad order and condition, due to the negligence of the defendant, and that on account of such bad order and condition, the actual loss was the actual value; yet the judgment was for $1,760.70 only. [46]

III.

The Court found that at the time of the delivery to the defendants, or its connecting carrier, of the whiskey and spirits described in the complaint, an Internal Revenue Tax of $1.10 per gallon, imposed by public statute had been paid thereon; yet the

judgment was for $1,760.70 only, that is to say, 50 cents per gallon.

IV.

The Court found that the consignor of the goods and the initial common carrier thereof agreed, at the time of the various shipments set forth in the complaint, that the whiskey and spirits shipped were of a "value limited to 50 cents per gallon," but found that the agent of the initial carrier knew, at the time of such shipments, that the value was greater than 50 cents per gallon; yet, in spite of the illegality of such agreement, the judgment was for $1,760.70 only, in lieu of the real value of $5,694.76.

V.

The Court found that the various published tariffs issued by the defendant and other connecting common carriers by rail covering the shipments involved in the above-entitled action, compelled the consignors of the whiskey and spirits shipped to limit the risk of such carriers to 50 cents per gallon or pay an additional freight rate of 20%; yet, in spite of the illegality of such published tariffs, the judgment was for $1,760.70 only, when in fact, the actual loss was $5,694.76, as found.

VI.

The Court found that the assignor of the plaintiff [47] delivered annually to the defendant its written agreement, by which it released the defendant and its connecting carriers in advance from any liability for goods lost or damages above the valuations arbitrarily fixed in their published tariffs; yet, in spite of the illegality of such agreement, the judg-

ment was for $1,760.70 only, in lieu of the real value of $5,694.76.

WHEREFORE, plaintiff prays that the judgment of said Circuit Court be reversed.

THOMAS, FRICK & BEEDY,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[48]**

[Title of Court and Cause.]

Order Allowing Writ of Error.

This 21st day of December, 1911, came the plaintiff, William Blackwell, by his attorneys, Messrs. Thomas, Beedy & Lanagan, and filed herein and presented to the Court his petition praying for the allowance of a Writ of Error and Assignment of Errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises,

In consideration whereof, the Court does allow the Writ of Error, upon the plaintiff giving a bond in the sum of Five Hundred ($500.00) Dollars, which shall operate as a supersedeas bond.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. **[49]**

[Title of Court and Cause.]

Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, William Blackwell, as principal, and E. R. Lilienthal and Joseph Sloss, as sureties, are held and firmly bound unto the defendant, Southern Pacific Company, in the full and just sum of Five Hundred ($500.00) Dollars, lawful money of the United States, to be paid to the said defendant, Southern Pacific Company, its successors or assigns, for which payment, well and truly to be made, we bind ourselves, our executors, administrators and assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this 21st day of December, A. D. 1911.

WHEREAS, on the 12th day of December, 1911, in the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, in a suit pending in said court between the said William Blackwell as plaintiff and the said Southern Pacific Company as defendant, a judgment was rendered in favor of the said plaintiff and against the said defendant, and

WHEREAS, the said William Blackwell, plaintiff, has obtained an order from said Court, allowing a writ of error to reverse [50] said judgment in the aforesaid suit:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said above-named principal, William Blackwell, shall prosecute said writ of error to effect and answer all damages

and costs if he fails to make said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

IN TESTIMONY WHEREOF, we have hereunto set our hands and seals, the day and year first above written.

W. BLACKWELL, [Seal]
Principal.
E. R. LILIENTHAL. [Seal]
JAS. SLOSS, [Seal]
Sureties.

State of California,
City and County of San Francisco,—ss.

E. R. Lilienthal and Jas. Sloss, being each duly and severally sworn, deposes and says: That he is a resident and householder within the Northern District of California, and is worth the amount specified in the above bond over and above all his debts and liabilities, exclusive of property exempt from execution.

E. R. LILIENTHAL.
JAS. SLOSS.

Subscribed and sworn to before me this 21st day of December, 1911.

[Seal] M. V. COLLINS,
Notary Public, in and for the City and County of San Francisco, State of California.

Approved this 21st day of December, 1911.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 21, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [51]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Record on Writ of Error.

I, Jas. P. Brown, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing fifty-one (51) pages, numbered from 1 to 51, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $30.60; that said amount was paid by Messrs. Thomas, Beedy & Lanagan, attorneys for plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of January, A. D. 1912.

[Seal] JAS. P. BROWN,
Clerk of the District Court of the United States,
Northern District of California.
By J. A. Schaertzer,
Deputy Clerk. [52]

[Writ of Error.]

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between William Blackwell, plaintiff in error, and Southern Pacific Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said William Blackwell, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, the 3d day of January, in the year of our Lord One Thousand Nine Hundred and Twelve.

[Seal] JAS. P. BROWN,

Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,

United States District Judge, Northern District of California.

Service of within Writ and receipt of a copy thereof is hereby admitted this 4th day of Jan., 1912.

C. W. DURBROW,
Atty. for Defendant in Error.

The answer of the Judges of the District Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commended.

By the Court.

[Seal] JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: No. 14,820. United States Circuit Court of Appeals for the Ninth Circuit. William Blackwell, Plaintiff in Error, vs. Southern Pacific Co., Defendant in Error. Writ of Error. Filed Jan. 4, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error.]

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Southern Pacific Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein William Blackwell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 3d day of January, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge.

Service of within Citation, by copy, admitted this 4th day of January, 1912.

C. W. DURBROW,
Attorneys for Deft. in Error.

[Endorsed]: No. 14,820. U. S. Circuit Court of Appeals for the Ninth Circuit. William Blackwell, Plaintiff in Error, vs. Southern Pacific Co. Citation on Writ of Error. Filed Jan. 4, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2103. United States Circuit Court of Appeals for the Ninth Circuit. William Blackwell, Plaintiff in Error, vs. The Southern Pacific Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed January 6, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2103

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM BLACKWELL,
Plaintiff in Error,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

The case, as disclosed by the special findings, is as follows:

At the times described in the complaint, defendant, which was a common carrier of goods by rail, received at several of its Eastern termini, in good order and condition, certain whiskey and spirits, of the actual value of $5,694.76, to be delivered by it to the Crown Distilleries Company, the assignor of the plaintiff, at some of the defendant's Western termini in California.

On account of the negligence of the defendants, the goods were delivered to the consignee in

bad order and condition, by reason of which the consignee suffered an actual loss of $5,694.76.

The Crown Distilleries Company annually executed and delivered to the defendant a contract called "Season Freight Release", by which it released defendant from all liability, except gross negligence, on all goods forwarded to it on an agreed valuation and at special rates below published tariff, for such transportation (Transcript fols. 23-24).

There were various public tariffs issued by the defendant, covering the shipments involved in this action, providing that spirits in wood could be transported at 85 cents per proof gallon where the carrier's risk was limited to 50 cents per proof gallon and so receipted for, but where the carrier's risk was not so limited, the rate would be $1.10 per proof gallon. In regard to whiskey in wood, the rates were fixed at $1.25 per proof gallon, where the risk was limited to 50 cents and $1.50 per gallon where the carrier's risk was not so limited.

During the period of shipments, Rule 16 of the West-Bound Tariff of the defendant was amended several times in regard to "Released Valuations". On January 18, 1904, Rule 16 provided that,

> "Where articles are provided for released to given valuations, the release given by the shipper should clearly state the limitation of valuation. When this requirement is omitted, shipments will be subject to an additional charge of 20%".

On January 10, 1908, Rule 16 was amended so as to read:

> "When a rate named in this tariff is fixed by limitation of value, shipper must endorse shipping order or bill of lading *'Released to Valuation Required Under this Tariff'*. When such notation is omitted a charge of 20% additional to rates named herein will be made."

On February 10, 1908, Rule 16 was again amended so as to read:

> "When a rate named in this tariff is fixed by limitation of value, shipper must endorse on shipping order or bill of lading *'Released to .....Valuation as Required Under this Tariff'*. When such notation is omitted, a charge of 20% additional to rates named herein will be made."

Again on March 17, 1908, Rule 16 was again amended so as to read:

> "When rate named in this tariff on any article is conditioned upon a limited valuation, as specified in this tariff, shipper must endorse on shipping order or bill of lading in terms set forth in this tariff and sign such endorsement: *'The Agreed Value of this Shipment is $.....*
>
> .....
>
> Shipper.'
>
> When such notation is omitted, a charge of 20% additional to rate named on such articles will be made."

On April 17, 1908, Rule 16 was again amended so as to read:

> "When rate named in this tariff on any article is conditioned upon the limited valuation

as specified in this tariff, shipper must endorse on shipping order or bill of lading in terms set forth in this tariff and sign such endorsements as follows:

'*The Agreed Value of this Shipment is $*.....

.....

Shipper.'

When such notation is omitted a charge of 20% additional to rates named herein on such articles will be made."

Each of the bills of lading issued by the defendant or its connecting carrier upon the receipt of the various shipments described in the complaint, had upon its face, inserted by the carrier, the words "Valuation 50 cents per gallon; owners' risk leakage"; or the words "Value limited to 50 cents per gallon; O. R. L.", the letters O. R. L. meaning "Owners' Risk of Leakage". The rates paid by the shipper upon each of said shipments were based upon such limited valuation.

At the time of each of these shipments there had been imposed upon the goods shipped, by public statute, an Internal Revenue tax of $1.10 per gallon, which tax had been paid, and the amount of such tax formed a portion of the real value of the goods shipped, in addition to the valuation of 50 cents per gallon, specified in the bills of lading.

The agent of the initial carrier who shipped the goods and issued the bills of lading, knew, at the time of such issue, that the whiskey and spirits described therein were of greater value than 50 cents per gallon.

Specification of the Errors Relied Upon.

There are six specifications in the assignment of errors contained in the Transcript, folios 45, 46 and 47, but each of such specifications is to the same effect that it was error to render judgment for $1760.70, that being the loss calculated at 50 cents per gallon, when the actual loss to the assignor of the plaintiff was in fact $5694.76, for the reason that all arrangements between the Crown Distilleries Company and the defendant, and the consignors of the Crown Distilleries and the defendant, were illegal, and that the plaintiff, as the assignee of the Crown Distilleries Company, was entitled to recover the actual loss of his assignor.

We submit the above as our interpretation of the object of Rule 24 of this Court.

Points and Authorities on Behalf of the Plaintiff in Error.

There is some actual and a good deal of apparent conflict of authority on the sole question presented in this case. The learned nisi prius judge decided the case at bar on the authority of

Hart v. Pennsylvania Railroad Company, 112 U. S. 331, and

Donlon Brothers v. Southern Pacific Company, 151 Cal. 763.

(See Judge Van Fleet's opinion, 184 Fed. Reporter 489.)

We maintain that the case can be clearly distinguished from those two authorities and that the same falls clearly within the class III-d, as described in the opinion of the Interstate Commerce Commission, rendered

In the Matter of Released Rates, XIII Interstate Commerce Reports, 550.

In dealing with rates conditioned upon the shipper's agreeing that the carrier's liability shall be limited to a certain specified value, the Interstate Commerce Commission says:

> "III (d). If the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount, liability for the full value cannot be escaped, in the event of loss due to negligence * * *. If the shipper and carrier collusively agree that, for the purpose of transportation, the property shall be deemed to have a specified value which both know to be grossly disproportionate to the true value, the agreement cannot be called bona fide. It may be styled an 'agreed valuation', but it is obviously an attempt to accomplish what the law forbids. The requirement that the carrier shall not limit, in any degree, its responsibility for negligence, is uncompromising and it will not yield merely because the parties choose to employ the phrase 'agreed valuation'. The law will not countenance so obvious a subterfuge."
>
> (Page 556 of Opinion.)

The class under which we submit our case falls, is again defined on page 561 of the same opinion, as follows:

> "The stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount, while purporting to be an agreed valuation, is in fact fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount."

In the Hart and Donlon cases, relied upon by the learned judge of the Circuit Court, there was no finding that the carrier, as well as the shipper, knew that the real valuation was in excess of the declared value. In neither of these cases, so relied upon, was the "released" value forced upon the shipper by the provisions of a tariff required to be published by law. On the contrary, in both cases the value was fixed at a sum, just and reasonable to the shipper, and the contract under discussion was expressly held, in both cases, to have been "fairly" entered into. In neither case did it appear that the real object and purpose of the agreed valuation was to limit the liability of the carrier against the consequences of its negligence, either in whole or in part. In the Hart case, Judge Blatchford says (pages 341-342):

> "The plaintiff accepted the valuation as just and reasonable. The bill of lading did not contain a valuation of all animals at a fixed sum for each, but a graduated valuation according to the nature of the animal. It does not appear that an unreasonable price would have been charged for a higher valuation."

Judge Lorigan says, in the Donlon case (page 775):

> "He (plaintiff) fixed the valuation on them himself; the defendant had nothing to do with it. * * * These special contracts provided for freight rates proportionate to the value of the horses shipped. 'An increase of 10 per cent in the freight charges for a rise of 100 per cent in the value of the horses to be transported cannot be said to be an unreasonable charge.'"

How different are the contracts in these cases from that in the case at bar. Governed by the tests laid down in the above quotations, the contract relied upon as a defense in the case at bar, is not fair and reasonable. The general rule is laid down by Judge Redfield in his American Railroad Cases and adopted with approval by the Supreme Court of the United States in

N. Y. R. R. Co. v. Lockwood, 17 Wallace 357.

> "That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances and, therefore, not binding."

Judge Bradley's reasons for the approval of this rule are striking. He says in the Lockwood case:

> "The carrier and his customers do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier pre-

> sents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay tariff rates. These were 70 cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds, making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are, and how necessary it is to stand firmly by those principles of law by which the public interests are protected."

The Court will note particularly that in both the Hart and Donlon cases a fair alternative was offered to the shipper. In the case at bar no such alternative was offered, nor could it have been specially offered in the case at bar as both parties were bound by a published tariff, provided for by the Interstate Commerce Act and neither shipper nor carrier could deviate from the rates so published without suffering severe penalties. The rate on spirits and whiskies did not pretend to be graduated according

to the value of the goods; the real value apparently cut no figure in the rate, which read:

> *"Carrier's risk to be limited to 50 cents per proof gallon and so receipted for."*

The Court will note that the only alternative presented to the shipper was an additional rate of 20 per cent. If, in the case at bar, the whiskey and spirits were worth, in fact, 51 cents per proof gallon, the unlimited rate on spirits would have been $1.02 in lieu of 85 cents and the rate on whiskey would have been $1.50 in lieu of $1.25.

The Interstate Commerce Commission flatly holds that such stipulation is unreasonable, saying (XIII Interstate Commerce Commission Reports, page 565):

> "The stipulation that 'shipments not made as above provided are subject to an additional charge of 20 per cent' is unreasonable. A certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited. An increased charge of 20 per cent is manifestly out of all proportion to the larger risk involved and its virtual effect is to restrict the public from rates calling for unlimited liability, and herein lies the vice in stipulations of this character."

The language used in Rule 16 of the Public Tariff (Trans. fols. 24 and 25) may be perfectly plain to an experienced railroad officer, but to the ordinary

shipper, the language is ambiguous. Whether the words "release" and "released" refer to the freight rate or to the valuation of the goods or to the liability of the common carrier, is impossible of determination. The Interstate Commerce Commission entitles its opinion as one "In the Matter of Released Rates." The West-bound Tariff of the defendant refers to "Released Valuation" (folio 24). The amendment of January 10, 1908, to Rule 16 provides for the endorsement on the bill of lading of "Released to Valuation Required under this Tariff". The amendment of April 17, 1908, reads, "conditioned upon a limited valuation" showing clearly that the carrier knows in advance that the "*limited*" valuation is not the *true* valuation.

The "Season Freight Release" contract, signed by the Crown Distilleries, carries out the idea that the primary purpose of this contract was not, as in the Donlon case, "to fix an agreed valuation * * * " as a basis upon which the freight rates should be " charged and paid" (page 796), but to limit the responsibility of the carrier without regard to the true value of the goods. The two last paragraphs of this contract bear out our contention that the object of the same was to limit the liability of the carrier rather than to make a rate proportionate to the value of the goods. It nowhere discloses an attempt on the part of either party to liquidate, in advance, the damages which the carrier would have to pay, based upon a bona fide valuation of the goods shipped. This general object to limit the liability of

the carrier is borne out by the published rates and Rule 16, for it was not until March 17, 1908, that the language used showed any agreement between the parties as to the value of the shipment.

The Court will note particularly that in the case at bar the plaintiff's assignor and its shippers did not have the opportunity, as in the Hart and Donlon cases, of stating in good faith a higher valuation and paying thereon a reasonable increase in freight. A mere increase of one-half of one per cent in valuation required an increased freight rate of twenty per cent without any alternative.

On one point decided in the Donlon case, there is an irreconcilable conflict of authority; that is the dictum of Judge Lorigan on page 775 that in determining whether the contract is fair and reasonable, the fact as to whether the agreed value reasonably approximated the real value cannot be taken into consideration. The case of

Hill v. Northern Pacific Railway Company,
(Wash.) 74 Pac. 1054,

supports Judge Lorigan's dictum. The weight of authority appears to be the other way, supporting the rule laid down by

Hutchinson on Carriers, Sec. 427,

which is as follows:

> "And it may be stated as a better rule, that, where the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and

> the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value on the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligations of responding for their real value where his misconduct has occasioned their loss."

Also authorities cited by Commissioner Lane at the end of page 559 and at the commencement of page 560, and in

Murphy v. Wells Fargo & Company, (Minn.) 108 N. W. 1070,

in which case the valuation of 550 cases of strawberries was fixed at $50.00, the freight paid was $330.00 and the actual value of the shipment was $2,000.00.

Since the decision in the Hart and Donlon cases there have been a number of cases involving the validity of contracts similar to those involved in the case at bar. In all of them the rule has been enforced,

1. That the agreement as to valuation must be a reasonable one;

2. That it must not be known to be a fiction by both carrier and shipper;

3. That the shipper had a fair and reasonable alternative presented to him; and

4. That the primary purpose of the contract must be to arrive at a bona fide valuation of the

goods shipped and not a mere arbitrary attempt to limit the liability of the carrier.

Hansen v. Great Northern Railroad, (N. D.) 121 N. W. 78;

A. T. & S. F. R. R. Co. v. Smythe, (Texas) 119 S. W. 892;

Louisville Railroad v. Warfield, (Georgia) 65 S. E. 308;

Southern Express Co. v. Hannan, (Georgia) 67 S. E. 945;

Central Georgia Railway Co. v. Buttu Marble Co., (Georgia) 68 S. E. 775;

Ostroot v. N. P. Railway Co., (Minn.) 127 N. W. 177;

Chicago and Rock Island R. R. Co. v. Wehrman, (Okl.) 105 Pacific 328;

Pierce Co. v. Wells Fargo & Co., 189 Fed. 561.

In the latter case, a majority of the Court held that the Hart case controlled the facts. There is a strong dissenting opinion by Noyes, Circuit Judge, who, while recognizing the authority of the Hart case, refuses to apply it to the facts involved in the case under discussion. In that case the bill of lading limited the liability of the company to $50.00. The goods, consisting of a carload of automobiles, of the actual value of $15,000, were fully described in writing, with the additional statement "value asked and not declared". It does not appear whether the shipper had any reasonable alternative offered

to him. Yet, one of the principal authorities distinguished in the majority opinion (*The Kensington,* 183 U. S. 263) holds void a contract limiting the liability for baggage on a transatlantic voyage to 250 francs, placing it expressly upon the ground that the limitation is arbitrary "unaccompanied by any right to increase the amount by an adequate and reasonable proportional payment".

We respectfully submit that the learned Judge of the District Court was in error in feeling bound to follow the ruling of the Supreme Court of the State of California in the Donlon case. We submit that it is not the law of this Court that it must adopt the declared policy of the State in which it sits.

Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477,

cited by the learned nisi prius Judge, does not so decide. It simply holds that the decision of a State Court enforcing a State statute refusing to a carrier the right to limit its liability by special contract, is not subject to review by a Federal Court. Moreover, the policy of the State in which the decision was first rendered, was not under discussion, the contract in question having been executed in New York, the case coming to the Federal Courts from the State of Pennsylvania. We admit that it has been the policy of the Federal Courts to enforce or to refuse to interfere with the enforcement of the laws of the State in which the contract was entered into (as distinguished from the law of the State in which

the Federal Court sits), where Congress has not legislated on the subject, but, we respectfully submit that since the decisions in the Hart, Donlon and Hughes cases, Congress has legislated on the subject of special contracts limiting carriers' liability, by the adoption of the amendment of 1906 to the Interstate Commerce Act, reading as follows:

> "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Under the above quoted statute, we submit that the "Season Freight Release" contract executed annually by the Crown Distilleries Company is void; that in contravention of this provision, it releases in advance all liability of the defendant, except for *gross* negligence, but, while the laws of the State of California recognize a distinction between ordinary and gross negligence, the Federal Courts have persistently refused to recognize any such difference.

> *Pierce v. Wells Fargo & Co.,* 189 Fed. 561;
> *Railway Co. v. Arms,* 91 U. S. 489.

We further call attention to the fact that none of the shipments described in the complaint made after

January 10, 1908, conform to any of the provisions of Rule 16 of the West-Bound Tariff, as amended on that date, and at various times thereafter, all of such amendments requiring the endorsement by the shipper on the bill of lading of his assent to the released or agreed valuation.

Under the facts presented, the case at bar must be distinguished from the Hart, Donlon and Hughes cases, on the grounds above stated.

All of which is respectfully submitted.

THOMAS, BEEDY & LANAGAN,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BLACKWELL,
Plaintiff in Error,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant in Error.

No. 2103.

Brief on Behalf of Defendant In Error.

By prefacing the argument which will be advanced in behalf of defendant in error by a brief statement of the facts, none of which are controverted, it is believed that the rules of law applicable to the sole question in controversy can be more easily applied.

The shipments in controversy were received in due course by the initial eastern carrier in good condition, and upon arrival at destination were found to have suffered damage, principally by leakage, while in the hands of some one of the carriers over whose lines the shipments moved. In the absence of proof by the carriers that the damage was not caused by their negligence, for which they

or either of them could be held liable, the law imputes negligence to them and, under the provisions of Section 20 of the Hepburn Amendment to the Interstate Commerce Act of 1906, C. 3591, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909], the initial carrier is chargeable with primary liability for the loss of the shipment in transit. No point is made, however, that the shipper failed to proceed against the initial carrier, and it may be assumed that whatever liability there may be is chargeable to the defendant in error. In the absence of any lawful special contract determining the value of the shipments, it is admitted that the defendant in error would be required, under the law, to respond by paying the full measure of loss sustained by plaintiff.

The record discloses, however, that the tariff in effect at the time the shipments moved provided rates of $1.02 and $1.50, respectively, upon "spirits in wood" and "whiskey in wood", and that, upon the payment of such rates by the shipper, the carrier was obligated to transport the shipments under its common law and statutory liability, which would require it, in the case of loss of or damage to the shipments, to pay the shipper the actual loss which he had sustained. The tariff also provided alternative rates of 85c and $1.25, respectively, upon "spirits in wood" and "whiskey in wood", when the shipments were made at the "released value" of 50c per proof gallon and so receipted for, etc. These rates were regularly published and filed in com-

pliance with the provisions of the Act to Regulate Commerce, (supra). Under these tariff provisions, the shipper could elect whether he would pay the higher rate, and in such case reserve the right to hold the carriers liable as insurers under their common law and statutory liability, or pay the lower rate, in the event he agreed in advance that the shipments were of a value of 50c per gallon, and that this amount should be the measure of damages which he could recover in the event the shipments were lost or damaged in transit. All the shipments in question were made by the shipper, at his option, under the so-called "released rate", the lower alternative rate, and the shipper has paid this lower rate in each case.

Plaintiff in error, however, now claims that the carriers must compensate him for the full value of the shipments which were damaged or lost, because of the negligence imputed to the carrier by law, notwithstanding the special contracts evidenced by the bills of lading, season freight release and tariffs, which are read into the contract by operation of law, and which provided in effect that if the shipments were lost in transit, the carrier should respond to the shipper by paying 50c for each gallon of spirits or whiskey which had been shipped.

To state the case plainly, *the shipper elected* to avail himself of the lower alternative rate but, finding that the shipments were damaged or lost in transit, now seeks to recover the full measure of the damages which the carriers would have been

obliged to pay him had he shipped at the higher rate.

It is conceded by counsel for plaintiff in error that by virtue of the provisions of the special contracts, the shipper could not recover if the agreed value of the shipments approximated their actual value. And this concession necessarily carries with it the recognition of the well established rule of law that while a carrier cannot enter into a contract to relieve itself from liability for all negligence, nevertheless it may, by special contract, agree in advance upon the value of the shipment; in other words, liquidate in advance the damages which might be caused to the shipment while in transit.

The sole question, therefore, which is presented to this Court for determination is whether shippers and carriers may, by special contract, agree in advance upon the value of a shipment which is tendered to the carrier for carriage without reference to its actual value, or stated in other words, whether the shipper and carrier may, by special contract in anticipation of possible damages, liquidate those damages without reference to the actual value of the shipment.

It is submitted that this question must be determined affirmatively, whether reference is had solely to the rules which obtain under the common law or whether reference also be had to the declared policy of the State of California as disclosed by its statutes and the decisions of its Courts.

THE SPECIAL CONTRACTS PROVIDING FOR AGREED VALUATIONS ARE VALID AND ENFORCEABLE UNDER THE RULES OF THE COMMON LAW

Leaving out of consideration questions relating to the declared policy of this State with reference to special contracts, such as were executed in the case at bar, and having reference only to the common law rules which would govern in cases such as this, it will be found that the Supreme Court of the United States, in the leading case of Hart vs. Pennsylvania Railroad Co., 112 U. S. 331, has determined the precise point in controversy favorably to the contentions of defendant in error. Mr. Justice Blatchford's learned exposition of the carrier's common law liability, and his statement of the rules which govern the right of carriers to exempt themselves in special cases from the severe liability which is imposed upon them by the common law, has been accepted by the Federal courts and by a great majority of the state courts. In subsequent cases where the Supreme court has had occasion to determine questions relating to those which were decided in the Hart case, it has served as a foundation of its decisions. The facts of the Hart case are largely similar to those of the case at bar, and the court decided the precise question which is raised herein.

The defendant carrier had published alternative rates for the carriage of livestock, which were based

primarily upon the value of the livestock. Hart exercised his option, as did the plaintiff in error in the case at bar, to ship at the alternative rate, which was obtainable only where the livestock did not exceed the value fixed by the "released rates". The horse shipped by Hart and which was killed in transit, was alleged to be of the value of $15,000.00, whereas by virtue of the tariff and bill of lading Hart had declared at the time the horse was shipped that it was of no greater value than $200.00.

The facts in the Hart case are identical with those in the case at bar in this particular; and the court found in both cases that "if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged."

In the Hart case the Supreme Court held, as was held by the trial judge in the case at bar, that "the rate of freight is indissolubly bound up with the valuation".

And it is well at the outset to indicate clearly that the shipper in the case at bar, by electing to ship at the lower rate, actually fixed the rate himself, and that this lower rate was determined primarily by reason of the fact that the risk, a fundamental element in the making of rates, was lessened.

In the Hart case, the Supreme Court held that "if the rate of freight named was the only one offered by the defendant, it was because it was a

rate measured by the valuation expressed. If the valuation was fixed at that expressed when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation on the agreed rate of freight". p. 337.

The Court then goes on to determine the question whether a value fixed upon the shipment at the time it is delivered to the carrier must be taken as the value of the shipment as well in cases where the value is suggested or fixed by the carrier, as in cases where the shipper himself declares the value without suggestion from the carrier.

The Supreme Court says (338)—

> "We see no sound reason for this distinction. The valuation named was the 'agreed valuation', the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on the condition that such was the valuation and that the liability should go to that extent and no further."

It is clearly pointed out that the rule announced by the Court must obtain, irrespective of the fact that the actual value of the shipment is wholly disproportionate to the agreed value ($15,000.00 against $200.00), because, as the Court says: "the articles have no greater value for the purpose of the contract of transportation between the parties to that contract * * * *" than the value to which the shipper and carrier have agreed, and that

"the carrier must respond for negligence up to that value". But the Court goes on to say that "it is just and reasonable that such a contract fairly entered into, and where there is no deceit practiced on the shipper, should be upheld". Plaintiff in error here, like the plaintiff in the Hart case, did not in the course of the trial raise the point that he did not fully understand the terms of the entire contract, or that he was induced to sign it under any misapprehension. But even if it had not been conceded by counsel that the contract was fairly made, this Court must indulge the presumption that such was the fact in the absence of proof to the contrary and especially where, in cases such as this, the record discloses that the shipper was accustomed to make frequent shipments of these same commodities between the same points, and for the mutual convenience of himself and the carriers executed a special agreement which enabled him to take advantage of the lower rate upon all his shipments by executing the contract known as the "season freight release", which obviated the necessity of agreeing in advance upon every particular shipment.

In this connection exception must be taken to the following language found in the brief for plaintiff in error, page 9:

> "The Court will note particularly that in both the Hart and Donlon cases a fair alternative was offered to the shipper. In the case at bar no such alternative was offered, nor could it have been specially offered in the case at

bar as both parties were bound by a published tariff, provided for by the Interstate Commerce Act and neither shipper nor carrier could deviate from the rates so published without suffering severe penalties."

The record discloses without conflict, as has already been pointed out herein, that alternative rates were in effect and that the shipper might elect under which rate he would ship; and not only is the lower rate presumed to be reasonable because the element of risk is subordinated to some extent to the other factors which are taken into consideration in making rates, but the Court will indulge the presumption that the higher rate is likewise a reasonable, just and nondiscriminatory rate, especially when plaintiff inferentially questions this rate for the first time in his brief.

Chicago Great Western Ry. vs. I. C. C., 209 U. S. 108, 119.

In support of the proposition that the federal courts will hold contracts, such as were executed in the case at bar, to be lawful and will follow the rule announced by the Court in the Hart case, the Court's attention is directed to the case of Cau vs. Texas & Pacific Railway Co., 194 U. S. 427, 431, and to the case of Pennsylvania Railroad Co. vs. Hughes, 191 U. S. 477, 485, and particularly to page 486 of the latter decision, wherein the Court holds that—

> "The cases are numerous and conflicting, different rules prevailing in different states. The federal courts, in cases of which they have jurisdiction, will doubtless continue to follow the rule of the Hart case * * *."

In deciding the case of Pierce vs. Wells Fargo & Co., 189 Fed. 561, the Circuit Court of Appeals for the 2nd Circuit, in a well considered opinion, predicated its decision upon the Hart case and decided the case in strict conformity with the principles announced by the Supreme Court of the United States and held, that although the carrier had arbitrarily fixed a value for all packages without regard to their real value, the shipper should be held to have assented to the limitation contained in the bill of lading in consideration of the reduced alternative rate and that he could recover no more than $50.00, a value arbitrarily fixed by the *carrier*, although the shipment was of the actual value of $15,000.00.

Counsel for plaintiff in error, however, assumes the attitude of asking this court to reverse the Supreme Court of the United States under the authority of the Interstate Commerce Commission, and points to the decision rendered by the Commission entitled "In the Matter of Released Rates", 13 I. C. R. 550, wherein the Commission undertakes to analyze and differentiate the Hart case. But, as was pointed out by the opinion of the learned trial judge in the case at bar, 184 Fed. 489, 493-494, "a careful reading of the opinion" (of the Commission)

"in that case will disclose that this statement involves an obviously erroneous conception of the ground on which the conclusion of the Supreme Court was rested", and the opinion then demonstrates that the decision in the Hart case was not rested upon the principle of estoppel. But, however this may be, the opinion of the Interstate Commerce Commission in a matter such as this can carry no weight, if for no other reason than that the Commission preface their own opinion by a statement of a proposition which is selfevident, quoting its language, "inasmuch as the Commission does not take jurisdiction over claims for damages to goods in transit, it must be recognized that this problem is essentially one for the courts * * *". And for this reason it seems unnecessary to pause to point out wherein the Commission's opinion is in conflict with the decisions of the Federal Courts.

The decisions of the Supreme Court of the United States, to which reference has been given, control.

THE DECLARED POLICY OF THIS STATE RECOGNIZES THE VALIDITY OF SPECIAL CONTRACTS LIMITING THE LIABILITY OF THE CARRIER.

The District Court became vested with jurisdiction of this action solely by reason of the diversity of citizenship of the parties. No federal question was raised, and it is not asserted that any of the rights guaranteed to the plaintiff in error under the constitution or laws of the United States were in-

vaded or denied, and the trial judge therefore rightly concluded that the questions raised should properly be determined in conformity with the declared policy of the State of California, as disclosed by its statutes and the decisions of its courts, following in this particular the decision of the Supreme Court of the United States expressed in the case of Pa. RR Co. vs. Hughes, 191 U. S., 477.

An examination of the statutes of the State of California, (sections 2174-2175 Civil Code California), which are not merely declaratory, but also operate to extend and broaden the common law rule, will disclose the declared policy of the State to be, that the obligations of common carriers may be limited by special contract, provided that the common carrier does not endeavor to exonerate itself by any agreement made in anticipation thereof from liability for gross negligence, fraud or willful wrong of itself or its servants.

The Supreme Court of the State of California has interpreted these code sections in a case where the facts are analogous to those in the case at bar.

Donlon vs. SP Company, 151 Cal., 763.

The decision of the State court in this case is predicated upon the rules announced by the Supreme Court in the Hart case, and the precise question at issue here was expressly determined by the State Supreme court. It therefore does not become necessary for this court to determine whether the rules announced in the Hughes case *supra* are properly applicable, because there is com-

plete harmony in the decisions of the Federal courts, and the decision of the Supreme court of this State.

It is necessary, however, to call the court's attention, in passing, to the fact that while in the Donlon case the jury found that the loss of the freight was occasioned by the *gross* negligence of the carrier, no attempt was made to prove that the shipments in the case at bar were lost or damaged by reason of the *gross* negligence of the defendant in error or its eastern connections, but the plaintiff in error rested by showing loss and invoking the rule which imputes negligence to the carrier in the absence of an affirmative showing that the shipments were lost because of causes beyond its control.

In the Donlon case, the agreed value of the shipment was $20.00 for each horse, although the actual value, as found by the jury was $200.00 for the horse which was injured and $350.00 for the horse which was killed. As in the case at bar, the tariff provided for alternative rates, the lower rate being conditioned upon the carrier assuming a proportionately less risk. In this particular, it is important that the court bear in mind that the purpose of agreeing upon the value of a shipment in advance, as is held by the court in the Hart, Solan and Donlon cases, is not only to measure and fix the responsibility of the carrier, but also for the purpose of fixing the rate which shall be charged by the carrier and paid by the shipper.

In the Donlon case, the court says, page 769:

"The primary purpose of this contract was, as the rates of transportation charged by the carrier were measured by the valuation of the property shipped, to fix an agreed valuation of the horses in question as a basis upon which freight rates should be charged and paid, on condition that in case of loss the responsibility of appellant should be measured by such agreed valuation. *The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability.* It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property—its actual valuation for all purposes of the contract; and as appellant assumed responsibility for loss to the full extent of such valuation there is no room for claiming that the contract was an attempt to exonerate it from the liability which the statute imposed. On the contrary, it assumed under it full liability for the actual value as that actual value was agreed on. * * * * *

Full responsibility under the statute for the loss of the property carried could not exceed its actual value, and while under the statute a carrier cannot by contract exonerate itself from liability for such value, there is nothing in the statute which prohibits the parties by contract from determining freely in

advance what the actual value of such property is as the measure of the responsibility of the carrier when it attaches."

In passing upon the precise question which is raised here upon appeal, the Supreme Court of the state, at pages 775, 776 said:

"Nor in determining whether such a contract is fair or reasonable, can there be taken into consideration the fact whether the agreed value of the property reasonably approximated its real value. That question was presented in some of the cases cited. In *Hill v. Northern Pacific Ry. Co.*, 33 Wash. 697, (74 Pac. 1054), in reply to a contention of counsel for appellant urging that it should, the court said: "An examination of the cases cited we do not think sustains this contention, and even where there has been an attempt to make this distinction, it has been in principle a failure. The contract establishing the released valuation must be construed to embrace the real valuation." In the Hart case, 112 U. S. 331, 337, which was a suit relative to the value, as here, of racehorses, the court dismisses that contention as without merit, saying: "Although the horses, being racehorses, may aside from the bill of lading have been of greater value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixes. * * *" In *Steers v. L. N. Y. and P. S. S. Co., 57 N. Y. 1*, (15 Am. Rep. 453), the agreed valuation of the trunk in question was fifty dollars, whereas it was shown that the value of its

contents exceeded one thousand dollars. *In Zimmer v. New York etc. R. R. Co., 137 N. Y. 460, (33 N. E. 642),* the agreed valuation was one hundred dollars, though the value thereof found by the jury was over three thousand dollars. And in all the other cases cited sustaining such special contracts, necessarily the actual valuation must have exceeded the agreed valuation, and the question whether it did or not must have been held to be immaterial."

THE CONFLICT IN THE AUTHORITIES HAS RESULTED FROM THE DIFFERENCE IN THE DECLARED POLICY OF THE FEDERAL COURTS AND OF THE COURTS OF THE SEVERAL STATES.

Counsel for plaintiff in error correctly states, that there is considerable actual conflict in the authorities, but this conflict is explainable by an examination of the decisions which have been rendered by the Federal and State courts, which disclose that where the rules are different from those announced by the Federal courts and the courts of California, it is because the declared policy of the state has been against permitting carriers and shippers to freely agree in advance as to the value of shipments.

In the Hart case the Supreme Court of the United States says: "The decisions in this country are at variance", and then goes on to cite cases which support the rule which it regards as the

proper one to be applied, and then cites several cases in which a contrary rule is sustained. After citing these authorities the court holds: "We have given consideration to the views taken in these latter cases, but are unable to concur in their conclusions". In the Hughes case, page 486, the court states: "The cases are numerous and conflicting, different rules prevailing in different states. The Federal courts, in which they have jurisdiction, will doubtless continue the rule in the Hart case * * *".

It is, therefore, respectfully submitted that in deciding the case at bar, this court is bound by the rules announced by the Federal courts and by the court of the State of California, which declares the rules to be not only in accord with the policy announced by the Federal courts, but with the declared policy of the state expressed by legislative enactment.

CONGRESS HAS NOT LEGISLATED ON THIS SUBJECT.

The counsel seeks to invalidate the special contracts upon which the defendant in error relies by reference to Section 20 of the Act to Regulate Commerce, as amended by the Hepburn Amendment in 1906 (U. S. Comp. St. Supp. 1907, page 909).

The paragraph quoted at page 16 of the brief of plaintiff in error was not designed to cover the case which is here presented. The declared purpose of

that statute was to overcome the rule which had been uniformly recognized by the Federal and State courts of compelling the shipper to prove that shipments had been lost or damaged upon the line of some one of several carriers forming a through route; and, as the statute clearly indicates, it intended to do no more than to abrogate this rule and impose upon the initial carrier of the through route primary liability and responsibility for loss of or damage to shipments, no matter upon which line the loss or damage occurred.

This question has been set at rest by the decisions rendered in the cases of Smeltzer vs. St. L. & S. F. R. Co., 158 Fed. 649, 666-667 and Riverside Mills vs. A. C. L. R. Co., 168 Fed. 987, 989, wherein the courts sustained the constitutionality of this section and defined its scope and purpose.

It necessarily follows, that in the absence of congressional legislation, the policy declared by the Federal court and by the Legislature and courts of the State of California must govern. Pa. R. Co. vs. Hughes, supra; M. K. & T. Ry. Co. vs. Haver, 169 U. S. 613, 635.

THE BONA FIDES OF THE TRANSACTION.

As already indicated, some suggestion is made in the brief for plaintiff in error to the effect that the carrier did not deal fairly with shipper, but it was conceded by counsel for plaintiff in error during the trial that the shipper did have an opportunity

of electing to pay the higher or lower rate, and as a matter of fact the tariff references contained in the record show conclusively that alternative rates were in effect, and that the shipper exercised his option to ship at the lower alternative rate under the agreed valuation instead of the higher rate which carried with it the obligation on the part of the carrier to respond to the full amount of damage which the shipper actually sustained.

The statements, therefore, made by counsel at page 9 of his brief already quoted herein, and the statement at page 12 of the brief are not supported by the facts. If there has been any attempt to take an unfair advantage in these transactions, the charge must rest upon the shipper, because it has been demonstrated that after having elected to ship at the lower rate, he now seeks to invoke the aid of this court in recovering a greater sum than that to which he is entitled under the provisions of the tariff.

Both of the alternative rates are presumed to be reasonable.

> Chicago Great Western Ry. Co. vs. ICC, 209 U. S., 108, 119.

There can be no departure from the tariff rates which the shipper *elected* to pay and under which the shipments were actually made.

> Railroad Co. vs. Mugg, 204 U. S. 242;
> Hefley vs. Railway Co., 158 U. S. 98;
> A. J. Poor Grain Co. vs. C. B. & Q. Ry. Co., 12 I. C. R. 418;

decisions which have been rendered by the Supreme Court of the United States and other Federal Appellate Courts and the Supreme Court of the State of California, and likewise the Appellate Courts of a majority of the states. By so doing this Court will confirm the public policy expressed by the people of the State of California through their Legislature, and likewise the declared policy of the Federal Courts and many of the State Appellate Courts.

Respectfully submitted,

GUY V. SHOUP and
C. W. DURBROW,
Attorneys for Defendant in Error.

WM. F. HERRIN,
Of Counsel.